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LAW REVIEWS

IN THE

Supreme Court of the United States

No. 71-507

WILFRED KEYES, ET AL., *Petitioners*

v.

SCHOOL DISTRICT No. 1,

DENVER, COLORADO, ET AL., *Respondents*

BRIEF ON THE MERITS IN SUPPORT OF RESPONDENTS SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL., SUBMITTED BY THE STATE OF INDIANA, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Indiana, by the Attorney General of Indiana, respectfully presents this brief amicus curiae in support of the School District No. 1, Denver, Colorado, et al., pursuant to paragraphs 4 and 5 of Rule 42 of the Rules of the Supreme Court of the United States.

The State of Indiana, pursuant to its Constitution, Article 8, Section 1 (1851), and statutes duly enacted, has provided for a system of common schools, wherein tuition shall be without charge, and "equally open to all."

An examination of the session laws of the General Assembly of Indiana, from 1850 forward, demonstrates the

State's commitment to the development of quality education in Indiana. Those laws speak to myriad items. Some of them are: teacher training; teacher qualification and certification; curriculum development and inspection; quality of curriculum; quality and safety of buildings; libraries; student-teacher ratios; student attendance; and student educational development. See generally, *Indiana Code, 1971*, Title 20 and Title 21.

The interest of the amicus is in seeking an interpretation of the Equal Protection Clause of the 14th Amendment, which will permit a continued development, a continued expansion, and a continued experimentation in educational programs in Indiana. It is a development and educational evolution which recognizes the vast complexities in educational programs in an open and pluralistic State, and also recognizes that within that development and evolution there shall be an equal educational opportunity for all students enrolled in public schools.

The amicus asks the Court not to restrain that development and evolution by a constitutional interpretation which would impose an interdicting rigidity, in the name of the Fourteenth Amendment, in educational theory and practice, as well as in established educational programs.

Accordingly, the amicus urges that the opinion and decision of the United States Court of Appeals for the Tenth Circuit, 445 F.2d 990 (1971) (App.Pet.Cert. 122a-160a), be affirmed but only to the extent that it reversed the opinions United States District Court, 313 F.Supp. 61 (1970) (App. Pet.Cert. 44a-98a), 313 F.Supp. 90 (1970) (App.Pet.Cert. 99a-121a).

This brief amicus curiae is limited in its discussion and presentation to that part of this case which is represented by the reversal in the Tenth Circuit of the District Court.

OPINIONS BELOW

The opinion of the Court below consists of the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, filed June 11, 1971, 445 F.2d 990 (App. Pet.Cert. 122a-160a). The opinions in the District Court are found at (App.Pet.Cert. 44a-98a) 313 F.Supp. 61; (App. Pet.Cert. 99a-121a) 313 F.Supp. 90 (1970).

In its opinion and judgment, the Court of Appeals ordered that the judgment of the District Court be affirmed in all respects except that part pertaining to the "core area" or "court designated schools"; and it particularly reversed the District Court in its legal determination that those schools were maintained in violation of the Fourteenth Amendment because of "unequal educational opportunity afforded, this issue having been presented by * * * the Second Cause of Action contained in the complaint." (App. Pet.Cert. 160a), 445 F.2d 990, 1007.

JURISDICTION

The Supreme Court has jurisdiction to review this case by writ of certiorari under 28 U.S.C. 1254(1), and has accepted it for such purpose by granting said writ on January 17, 1972 (A. 1988a).

QUESTIONS PRESENTED FOR REVIEW

The schools in Denver, Colorado, which were affected by the District Court's decisions (App.Pet.Cert. 44a-98a), 313 F.Supp. 61, (App.Pet.Cert. 99a-121a), 313 F.Supp. 90, were divided into two categories, towards which the plaintiffs directed separate claims for relief in separate causes of action, supported by alleged separate and independent legal theories. The second category or group of schools, called hereafter (and in the case throughout), the "court-designated schools" or the "core area schools" was the subject

of the second claim for relief, in four counts, of which the third became primary.

The gist of the second claim for relief as developed by the complaint, evidence, and findings, was that because of comparatively low average achievement test scores of the pupils tested in the "court-designated schools", (and because of low morale and because of "segregation" [the word is used in quotation because the court found that there was *no state or officially imposed* segregation] in those schools) there was a denial of an equal educational opportunity and of equal protection of the law. The following questions are presented:

1. Shall *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, be reinterpreted to render unconstitutional the distinctive achievements among students in public schools which may be shown by standard achievement tests whenever they are administered?

2. Are there adequate data available, either in the record of this case or information in the public domain, upon which to develop a rule of constitutional law under the Fourteenth Amendment, Equal Protection Clause, concerning standard achievement scores and equal educational opportunity?

3. When there is *admittedly* no dual school system present, and when the District Court finds that there is no *de jure* segregation present in the specific schools about which plaintiffs complained in a separate count, does the District Court have judicial power to decree compulsory integration and compensatory educational programs?

4. After a District Court found that there was no *de jure* segregation in the court-designated schools, but

then concluded that there was a denial of an equal educational opportunity because of lower achievement levels in standard achievement tests administered in those schools, does the District Court have power to decree compulsory integration, and compensatory educational programs which must be subordinated thereunder?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first and fifth sections of the Fourteenth Amendment; and the Civil Rights Act of 1964, § 401, 42 U.S.C. 2000c; § 407, 42 U.S.C. 2000c-6; and § 410, 42 U.S.C. 2000c-9. These constitutional and statutory provisions are printed in the Appendix to this brief.

STATEMENT OF THE CASE

In this case the plaintiffs filed a complaint which contained two (2) causes of action, each with separate and distinct legal theories and claims for relief. (A. 2a-57a).

The complaint related to two groups of schools in Denver, Colorado. The first group of schools, called in the case and litigation the "Resolution schools" (because they were affected by Denver School Board resolutions), was the subject of the First cause of action. Concerning those schools, a hearing was held in July, 1969, which resulted in a preliminary injunction. Defendant was later to present its evidence, but the District Court found that the action of the School Board in rescinding and nullifying a school integration plan, had "the effect of perpetuating school segregation * * *" (App.Pet.Cert. 19a and 37a). 303 F.Supp. 279 at 288; 303 F.Supp. 289 at 296-97, in that the action was taken with knowledge of the consequences, and had a tort-like wilfullness about it, 303 F.Supp. at 286.

Court-Designated Schools, or Core Area Schools

"The evidentiary as well as the legal approach to the remaining schools [referred to hereafter as the "court designated schools" or the "core area schools"] is quite different from that which has been outlined above." (App. Pet.Cert. 57a), 313 F.Supp. 61 at 69 (1970).

Concerning these schools,[1] the plaintiffs first complained that there was *de jure* segregation (*Id*), because of boundary changes and other acts on the part of the School Board; but the District Court *found* that there was no *de jure* segregation (App.Pet.Cert. 75a), 313 F.Supp. 61 at 77. The court also said, concerning these schools, that it "is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." (App.Pet.Cert. 67a), 313 F.Supp. 61 at 73.

In the second count of the second cause of action, the plaintiffs asserted that the neighborhood school policy was itself maintained for the purpose of, and with the effect of, segregating minority pupils,[2] to a degree that it was un-

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[1] Eventually the Court said that there were 15 schools involved. The court said, "we are here primarily concerned with the following schools: Bryant-Webster, Columbine, Elmwood, Fairmont, Fairview, Greenlee, Hallett, Harrington, Michell, Smith, Stedman and Whittier Elementary Schools; Baker and ColeJunior High Schools; and Manual High School." (App.Pet.Cert. 78a), 313 F.Supp. 61 at 78.

[2] The plaintiffs themselves used a racial and minority class grouping which is of far more than casual interest. It should be noted because it is in contrast to the bases of much of their experts' testimony, namely the *Coleman Report*, see footnote 14 infra.

"In some schools there are concentrations of Hispanos as well as Negroes. Plaintiffs would place them all in one category and utilize the total number as establishing the segregated character of the school. This is often an oversimplification * * * [which] * * * plaintiffs have accomplished * * * by using the name 'Anglo' to describe the white community. However, the Hispanos have a wholly different origin, and the problems applicable to them are often different." (App.Pet.Cert. 58a), 313 F.Supp. 61 at 69.

constitutional. But the district court rejected that claim too, saying that there was no such policy apparent.

The third count of the second cause of action said, in part, that the neighborhood school system was unconstitutional if it produced segregation in fact in a school system. In short, regardless of the cause, regardless of the absence of state or official law or policy, if the result was a separation or segregation, it was unconstitutional. This too the District Court rejected under the authority of previous cases in the Tenth Circuit, which in turn was built on cases in this Court.

The District Court then approached the heart of plaintiffs claim in their second cause of action. It was that the defendants were maintaining the "court-designated schools" in such a way as to fail to provide an equal educational opportunity for students attending them.

All of those schools, plaintiffs said, produced low average scholastic achievement. They also maintained that there was a high teacher turnover; a higher student dropout rate; that there were older buildings and smaller building sites; and that there were less experienced teachers.

The District Court agreed that there was a low achievement level present and significantly lower than in other schools in the city, as shown by comparative scores on the 1968 Stanford Achievement Test results. The trial court made findings of fact with regard to teacher experience, teacher turnover, pupil dropout rates, and building facilities, but there was no finding, as there could not have been on the evidence presented, that there was a *causal* relationship between these factors and student achievement. (App.Pet.Cert. 78a-89a), 313 F.Supp. 61 at 78-83.

To then seek the judicial declaration of court-ordered equalized achievement, the plaintiffs presented the testimony of several witnesses, chief among them, and on

which testimony the district court relied, were Dr. James Coleman (A. 1516a-1561a); Dr. Neal Sullivan (A. 1562a-1598a); Dr. Robert O'Reilly (A. 1910a-1968a), and in a prior hearing, Dr. Dan Dodson (A. 1469a-1513a).

It is clear that some of the plaintiffs' witnesses sought society-wide, social reformation, which would simply use the school system as the instrument of change:

Dr. Dan Dodson:

"Q. Now, isn't it also true that in your study you found that race is not causally related to the achievement level in these minority schools?

A. That's right." (A. 1508a)

* * *

After discussing the socioeconomic structure of some areas, but not Denver, Colorado, and the effect of a parents' educational background, Dodson continued:

"Q. In other words, you think, then, that it's the schools' problem?

A. I certainly do.

Q. And so your opinion is that the school has an obligation for a social change?

A. That's right.

Q. For the entire community?

A. That's right.

Q. Not for just the—not for the achievement of academic aspect of the school?

A. That's right." (A. 1509a).

* * *

"Q. In other words then, you mean that the board must cure any racial imbalance created by housing patterns in their school system?

A. I think that's right." (A. 1510a).

Another witness, Dr. Neal Sullivan testified, in part:

> "Q. Now, also, even under your own theory that integration in the schools has to be—as you say in the article, a massive educational revolution? Right?
>
> A. I like that expression.
>
> Q. Well, that's yours, isn't it?
>
> A. You bet. I like that language.
>
> Q. You need something more than integration?
>
> A. You bet. Massive reform. (A. 1595a).

And the District Court itself caught the spirit of the thing:

> "The Court: I mean, psychologically, the school is taking over for the family in many instances. It has to. I know this is abhorrent to all of you. You just disregard it all at (sic) paternalism. But you can't. I mean, that is the fact of life. The church has fallen down somewhat. The family has collapsed, and there is not much left. And a kid has to relate to something, to an institution, and to people, doesn't he? Where is this substitute? So, you say there is no psychological foundation for this? [The Court was then, apparently, addressing Dr. O'Reilly]. There is no foundation in experience? That you can just substitute this competitive atmosphere? And this impersonal competitive atmosphere of the integrated school and let him sink or swim?" (A. 1934a).[2]

The District Court held that there was no *de jure* segregation with regard to the core-city schools, and that a neighborhood policy was not unconstitutional per se as *de facto* segregation.

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[2] "One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination." Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 22-23 (1971).

But against such an evidentiary background, the District Court found an alternative. It held that the "core-city schools in question were providing an unequal educational opportunity to minority groups *as evidenced by low achievement and morale.*" (Emphasis added). (App.Pet.Cert. 100a), 313 F.Supp. 90, 91.

From that position the District Court then moved to a consideration of a remedial plan or plans, consistent with the *Brown I*,[4] *Brown II*[5] dichotomy.

During that proceeding, in May 1970, the District Court said on opinion, and largely in response to the proposals which the defendants raised, that the,

> "crucial *factual* issue considered was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects * * *" (App.Pet.Cert. 106a), 313 F.Supp. 90 at 94.

In an effort to answer that question the District Court then turned principally to the testimony of Dr. James Coleman (A. 1516a-1561a); Dr. Neal Sullivan (A. 1562a-1599a); and Dr. Robert O'Reilly (A. 1910a-1968a); 313 F.Supp. 90 at 94.

A Second Look at The Expert Testimony

The petitioners ask on brief that the Court itself conduct an independent examination of the record.[6] If so, then

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[4] Brown v. Board of Education, 347 U.S. 483 (1954).

[5] Brown v. Board of Education, 349 U.S. 294 (1955).

[6] Petitioners' Brief page 79. The authority cited for this request is *Haynes v. Washington*, 373 U.S. 503, 515-517 (1963); *Spano v. New York*, 360 U.S. 315, 316 (1959); *Stein v. New York*, 346 U.S. 156, 181 (1953); and *Oyama v. California*, 332 U.S. 633, 636 (1948). But the petitioners seek here a new constitutional rule: that equal educational opportunity shall mean equal achievement results, however measured. They deny this result, of course, see footnote 123, page 103 of Petitioners' Brief. But the district court said: "The final portion of the

under the evidentiary standards freely used in this case,[7] this Court can consider the relevant surveys, data, and findings (the "Coleman Report" 737 pages, for example, is marked as PX 500) which were used and to which reference was made, as well as other data and information which this Court can acknowledge and consider. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).[8]

The testimony given by these witnesses, when measured against the data admitted, and subsequent interpretation and analyses thereof, simply does not support the conclusions reached or the holding which the petitioners seek from this Court, as a principle of Constitutional law.

In short, having concluded, primarily on the basis of the 1968 Stanford Achievement Scores, that there was an unequal educational opportunity, these experts were called to discuss a remedy.

That testimony and the impact of other data upon it is discussed in the Argument section of this brief, under Argument I-C, *"The Testimony of Dr. Coleman, Dr. Sullivan, and Dr. O'Reilly."*

In summary, the results against which the District Court directed a remedy in regard to the "court designated" schools were not the product of, or caused by state action, or official, or school board action, or positive law. To the extent that these results were established (and the expert witnesses often testified that they were not referring to Denver in their testimony), they occurred adventitiously.

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plaintiffs' plan suggest a system of compensatory education programs, carried out in an integrated environment, *designated to equalise achievement."* (App.Pet.Cert. 102a), 313 F.Supp. 90, 91-92. (Emphasis added).

[7] Coleman—A. 1526a; Sullivan—A. 1568a, 1583a-1586a; O'Reilly—A. 1915-1928a.

[8] *"Equality of Educational Opportunity"* (H.E.W., G.P.O. 1966) PX 500 (herein *"Coleman Report"*); *"On Equality of Educational Opportunity,"* Mosteller & Moynihan (Vintage Ed. 1972) (herein "Mosteller & Moynihan"); *"The Effectiveness of Compensatory Education"* (H.E.W., G.P.O. 1972) (herein, *"Effectiveness"*).

The District Court thus entered findings and guidelines, which, generally, provided for a program of "desegregation" [which word, again, is used in quotation simply to recall to the reader that there was no state or officially imposed segregation] and compensatory education as a solution to low average achievement in the "court-designated schools." (App.Pet.Cert. 112a-121a), 313 F.Supp. 90 at 97-100. The preliminary injunction arising from the first cause of action remained in effect, except as altered by the orders entered.

This determination was reversed in the United States Court of Appeals for the Tenth Circuit, which said that the final decree and judgment of the District Court was affirmed, "except that part pertaining to the core area or court designated schools, and particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of unequal educational opportunity afforded, * * * *" (App. Pet.Cert. 151a), 445 F.2d 990 at 1007 (1971). Other orders are well described by the Denver School Board, on brief. On January 17, 1972, this Court granted a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

The brief amicus curiae is limited in its discussion to that part of this case which is represented by the reversal in the Court of Appeals.

SUMMARY OF ARGUMENT

I

In so far as the "court-designated" schools are concerned, the measure of this case as it reaches the Supreme Court is found in what this Court is asked to affirm from the District Court and the consequences it would have on educational development throughout the United States. This Court is being asked to affirm the assertion, as a

matter of Constitutional law, that compensatory educational programs, as a means to develop and improve a child's educational performance and achievement, are unconstitutional unless they are developed in the setting of subordination to racial and economic integration, as effected by the remedies which were developed in, and are borrowed from, the cases decided from *Brown I* to *Swann*.

But the empirical data which have become available since this case was in the District Court show that the bases for that court's holdings with regard to both the wrong and the remedy are disestablished to such an extent that no constitutional interpretation should be indulged in.

II

The Fourteenth Amendment, as interpreted by this Court, and as addressed and interpreted by the Congress of the United States, does not mandate a specific educational performance among children attending a public school.

The Fourteenth Amendment should not be interpreted so to mean that equal rights under the law, when one is confronted by the State, shall mean equality in achievement when one attends a public school.

Racial segregation was never an educational program; it was a social-racial policy imposed in an educational system by the State.

In the name of racial (or economic) desegregation, the Fourteenth Amendment should not be interpreted to require an educational program which would attempt to develop but one result: equal achievement among students, as evidenced by achievement test scores.

ARGUMENT

I

The Fourteenth Amendment Does Not Mandate A Specific Intellectual Result Among Children In Public Schools, Measured By Achievement Tests. Compensatory Educational Programs, Designed To Attempt To Improve Performance Require Flexibility For Development. Empirical Data Do Not Support Their Subordination Pursuant To The District Court's Holdings, To Racial And Economic Integration. Those Holdings Are Disestablished To Such An Extent That A Constitutional Ruling Is Improper.

A. Introduction

In the District Court, this was a great case. Walter Lippmann remarked many years ago, in America there is a distinct prejudice in favor of those who make accusations. Never was such an observation more appropriate than in this judicial proceeding.

It was a great case because a great school board, in Denver, Colorado, was well defended. It was a school system which had known a tremendous population growth subsequent to World War II, and it dealt with the remarkably complex educational problems which evolved from it, very well indeed. It was a school system which in fact spent over 100 million dollars on new buildings and installations since World War II. Its effort to manage the urban sprawl's impact on education was well underway long before the Congress and Executive branches of the Federal Government created the Department of Housing and Urban Development, or the Department of Transportation, or the Environmental Protection Agency, which is some testimony to their recognition of the urban problems confronted by the Denver School Board. But it came long after that School Board was already making the effort.

It was a School Board which never resulted, as the State of Colorado did not, to the use of a dual school system. There was in fact, for the School Board in Denver, simply no factual analogy to the bases of the cases and schools found in *Brown I*,[9] or *Green*,[10] or *Swann*[11]. Nor, for that matter, was the case factually similar to the *Tulsa*[12] case in the 10th Circuit.

Those were cases which arose in a dual school system, or they were cases in which the School Board failed to deal with the "vestiges of dualism".

But as the growth of Denver was great, so also was its growth of minority groups. In 1940 the Negro population was 8,000 persons. In 1966, it was estimated by plaintiffs' witness Bardwell to be at 45,000. Faced with this growth, still no dual school system ever developed, or existed in Denver. No person was ever excluded from any school because of race, color, or ethnic origin.

At the beginning of the school year 1968-69, there were 116 schools: 92 elementary, 15 junior high schools and 9 senior high schools. In the elementary schools, Negro students were enrolled in 78, "Hispano" in 88, "Anglo" in 92. Among the 15 junior high schools, there were Negro students in 14 of the 15, and Hispano in all 15. Anglo were in all 15. Among the high schools, Anglo and Hispano students were enrolled in all 9 schools; and Negro students in 8 of the 9 high schools.

In short, the defendant Board did not refuse to admit any student at any time because of racial or ethnic origin.

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[9] Brown v. Board of Education, 347 U.S. 483 (1954).

[10] Green v. County School Board, 391 U.S. 430 (1968).

[11] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[12] United States v. Independent School District No. 1, Tulsa, Oklahoma, 429 F.2d 1253, 1259 (10th Cir. 1970).

It simply required a student, consistent with the Civil Rights Act of 1964, § 410, 42 U.S.C. 2000c-9, to attend his neighborhood school. (App.Pet.Cert. 67a), 313 F.Supp. 61 at 73.

But if, as Lippmann said, there is prejudice in favor of one who makes an accusation, then the prize will go to he who makes the greatest accusation.

For the accused, however, the Denver School Board, the dilemma was enormous. The attack took a bifurcated approach. First, there was the accusation relating to the usual kind of segregation charge: the location of school buildings; boundary changes; the formal actions of a school board, and the like. That attack, as the case left the District Court, was largely a failure.

Secondly, in the plaintiffs' second cause of action, there was an attack for the "failure" of the School Board to cause students to achieve at the same level according to the Stanford Achievement Tests. The District Court found, "and concluded that the achievement level in these schools is markedly lower and dropout rates are high; and that there has been a concentration of minority and inexperienced teachers." (App.Pet.Cert. 90a), 313 F.Supp. 61 at 84. This presented an opportunity, as the case concluded in the District Court, for petitioners to strike hard at an *entire* school system (as they now do in this Court, on brief, page 68-92, and their factual assertions, page 1-64, passim) and more. It was an opportunity to attempt to bury any further experimentation and development with compensatory education, a favorite *bête noire,* unless it is compelled to march in constitutional lockstep with the massive movement of children, and massive social reform, as plaintiffs' own witnesses described it, under the banner of *Green-Swann.*

Concerning the first leg of attack, the District Court gave primary attention to the rescinding of School Board Resolutions, 1520, 1524, and 1531, and the court concluded that such an act violated the case law of *Reitman v. Mulky*, 387 U.S. 369 (1967); 313 F.Supp. at 67-69. The Court of Appeals did not reach the point, 445 F.2d 990 at 1002, and the petitioners appear to have abandoned the idea in this Court, entirely. Then the District Court considered the charges of boundary changes 313 F.Supp. 61 at 69, but came to the finding that there was no *de jure* segregation, 313 F.Supp. 61 at 77.

Up to this point the primary finding concerned the construction of Barrett Elementary School, along with an incorporation of the preliminary injunction statements, 303 F.Supp. 289, 290-95, which when made did not then consider defendants' evidence. Concerning Barrett Elementary School, the trial court said that alternative sites were available; and both the trial court and the petitioners on brief made much of the testimony of Superintendent Oberholtzer, (313 F.Supp. at 73; Petitioners' Brief, e.g., pp. 18 and 20), because he was "of the opinion that it was not permissible for him to classify Negroes as such, even for the purpose of bringing about integration." (App. Pet.Cert. 66a), 313 F.Supp. 61 at 73.

The Superintendent, in supporting the neighborhood school policy of the Denver Schools, and in assuring that the conduct of the Denver School Board was "color blind", anticipated, insofar as their schools were concerned, the fact that their policy was to become the policy of the United States, and so it remains to this day, in the Civil Rights Act of 1964, § 410, 42 U.S.C. 2000c-9. That section provides:

> "Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion or national origin."

Speaking to that section, Senator Humphrey said:

> "Furthermore, a new section 410 would explicitly declare [it is then set out in full].
>
> Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide." 110 Cong. Rec. 12714 (June 4, 1964).

Again, Senator Humphrey spoke to one of the very central factual questions in this case, and one which, it appears, the petitioners' would attempt to obscure on brief in their presentation of a factual quagmire: that issue is the legitimacy of a neighborhood school which was not designed to cause or perpetuate racial discrimination or unlawful segregation, or, for that matter, a school district organized in the same way:

Senator Humphrey:

> "* * * The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. [The Senator was speaking of racial segregation]. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is racial imbalance per se is not something which is unconstitutional." 110 Cong. Rec. 12717 (June 4, 1964).

In short, § 410 of the Civil Rights Act of 1964 was specifically added to permit student classification into school districts, or neighborhood schools, on bases other than race, religion, color, or national origin.

It did hardly behoove the District Court, to remark the "failure on the part of the Board" to take some action

which would have an integrating effect, when to do so would violate the spirit and broad command of the Congress of the United States, in structuring a neighborhood school system; which the District Court itself found not to be in violation of *Brown I*.

Generally, the Court of Appeals affirmed those very limited findings, and felt restrained by Rule 52 in its review —although, now, of course, petitioners ask this Court to review the entire record.

Secondly, an attack came to the Board of a very different nature. It was that, as the District Court finally evolved the issue, there was no equal educational opportunity present with respect to the "court-designated" schools, even if there was no *de jure* discrimination. The District Court held that there was not. Then the District Court looked at essentially one item: the student achievement level as determined by the 1968 Stanford Achievement Tests. Other things found their way into this part of the decision: teacher turnover; pupil dropout rates (one premise for this consideration is conventional wisdom: "its better that he be in school than on the streets,", or, "if you are in school, then stay in school"); building facilities ("the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school", the court said, 313 F.Supp. 61 at 81), teacher experience, and the testimony of Dr. Dodson. The court did not find that these conditions caused inferior achievement, and the experts at the remedy stage did not so testify either.

The District Court did not find here a *Brown I* type of violation. Rather it turned to other cases and said: in an effort to safeguard the poor or minorities "state action, even if non-discriminatory on its face" which results in unequal treatment of "the poor or a minority group as a class" [presumably the District Court was referring to

racial minorities,although the word, coming after the word "poor" could have meant an economic minority] is unconstitutional uness the state provides substantial justification, citing *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. Califrnia*, 372 U.S. 353 (1963). 313 F.Supp. 61 at 82. Contra, *James v. Valtierra*, 402 U.S. 137 (1971).

B. The Court of Appeals and the Remedy in the District Court

As the case left the district court on the "violation" side, these thingshad occurred:

1. **On Plaintiff's First Cause of Action:**
   a) The district court found a *Reitman* violation; which was phased out of the case in the Court of Appeal.
   b) With regard to the Resolution Schools, and especially Barrett Elementary, the District Court found a kind of *Brown I-Reitman* violation, which received a Rule 52 affirmance in theCourt of Appeals.
   c) With respect to all other claims, all other schools, there was a finding that no *Brown I* vioation was present.
2. **On The Plaintiff's Second Cause Of Action:**
   a) The district court found no *Brown I* violation.
   b) The district court found a *Griffin v. California*, violation.

On appeal, theCourt of Appeals seemed at first to agree with the Distric Court in its assertion on equal achievement:

> "The trial court's opinion * * * leaves little doubt that the finding of unequal educational opportunity in the deignated schools pivots on the conclusion that segrgated schools, whatever the cause, per se produce lower achievement and an inferior educational opportunity." 445 F.2d 990, at 1004.

But then the Court of Appeals spoke one of the most important sentences in its entire proceeding;

> "Thus it is not the proffered objective indicia of inferiority which causes the sub-standard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs." Id. at 1004.

In short, the Court of Appeals did not accept the bases of the trial court's holdings, namely the items to which the trial court referred as showing a *Griffin* type of violation[18] (and allegedly justifying the remedy which plaintiffs sought and the trial court imposed) plus inferior achievement, in the sense that they provided a basis for a *Constitutional Mandate*

Implicit in the Court of Appeals holding is the fact that we really do not know what causes inferior achievement nor, especially, how to remedy it, sufficiently to form a rule of *Constitutional law,* binding on 200 million persons and all of their school districts and programs.

Even acknowledging the experts presented at the remedies hearing by the plaintiffs, educational achievement development is at the early ether stage of anesthetics. The most we can do is try, experiment, develop, test, determine, and try again. That is precisely what the Denver School Board recognized (as did the Court of Appeals) in its Resolution 1562, found at 445 F.2d 1009-10.

3. On The Remedy.

The opportunity which was presented to plaintiffs certainly was not lost. It was an opportunity to judicially subordinate compensatory educational programs to racial integration remedies, and more. It was an opportunity to

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[18] Again, those things were in addition to achievement scores, teaching experience, building facilities, pupil dropout rates, and teacher turnover, and the testimony of Dr. Dodson. 313 F.Supp. 61 at 78-82.

bury, once and for all, one of the most important observations made in the *Coleman Report:*

> "The overall results of this examination of school-to-school variations in achievement can be summed up in three statements:
>
> 1. For each group,[14] by far the largest part of *the variation in student achievement lies within the same school, and not between schools.*
> 2. Comparison of school-to-school variations in achievement at the beginning of grade 1 with later years indicates that only a small part of it is the result of school factors, in contrast to family background differences between communities.
> 3. There is indirect evidence that school factors are more important in affecting the achievement of minority group students; among Negroes, this appears especially so in the South. This leads to the notion of differential sensitivity to school variations, with the lowest achieving minority groups showing highest sensitivity."
>
> *"Coleman Report"* (1966) at page 297. (Emphasis added).

The plaintiffs did not pass the chance. They proposed a simple pairing plan, wherein the great distinctions in student achievement *within each school* in the Denver schools would be lost forever. That is, they would exist, but not be recognizable. The plan would take an *average achievement* among the students in a school, and pair the school with the *average achievement* among students in another school. (Pl.Ex.501-A).

To this the District Court gave its constitutional imprimatur.

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[14] The Report was referring to: Puerto Rican; Indian American; Mexican-American; Negro, South; Negro, North; Oriental American; White, South; White, North.

C. The Testimony of Dr. Coleman, Dr. Sullivan and Dr. O'Reilly

The plaintiffs called Dr. Coleman, Dr. Sullivan, and Dr. O'Reilly to speak about remedies, and there was one consistency among their remarks: they were not speaking about Denver, Colorado, and had no previous experience with the schools there.

The petitioners have summarized Dr. Coleman's testimony in this way: the studies of compensatory programs "have not been very encouraging with regard to their efforts." (A. 1537a) (Petitioners' Brief page 58), and that "I think" the major problem with compensatory educational programs has been the fact that the child's environment has not changed if he speaks with other children who are homogeneous with his past. *Id.*

The H.E.W. Report on *"Effectiveness of Compensatory Education"* of 1972 states:

> "In this connection, it is worth noting two additional features of the *Coleman* report:
>
> - As the author has recently pointed out, the Coleman report should not be used to claim that physical desegregation is the only educational treatment that can have any positive achievement effects.
>
> - There is no direct evidence in the *Coleman* report for the conclusion, sometimes drawn from it, that compensatory education does not work. The Coleman report analyzed the existing range of school conditions in 1965-1966 and had nothing to say about situations in which very substantial additional resources above normal school expenditures were provided for basic learning programs. *The Coleman report did not analyze any such intensive programs.* (Emphasis added). "The Effec-

tiveness of Compensatory Education," (H.E.W., G.P.O. 1972), page 10.

The petitioners also summarized the testimony of Dr. Sullivan. That is understandable. Dr. Sullivan appeared as the Secretary of the State Board of Education in the State of Massachusetts. As such, he spoke on several things: compensatory programs in Boston, Massachusetts, and Berkeley, California; inferiority complexes (A. 1579a); psychology (A. 1579a); sociology (Id.); and the moral duties of educators. (Id.) But the principal purpose of his testimony was to establish that a compensatory education program with which he was associated in Berkeley, California, was a failure, that it "had no effect." (A. 1578a).

He explained that Berkeley tried everything: "lower class size; "materials and equipment"; "[h]undreds of thousands of dollars for electronic equipment that most schools have now"; the "addition of paraprofessionals"; "lots and lots of black administrators"; "Black principals in white schools. We felt that was only fair. White principals in black schools. We felt that was good. You name it and we tried it." (A. 1577a). Still, he said, it was a failure.

The H.E.W. Report on *"Effectiveness of Compensatory Education"* (1972), said this:

> "The important difference between success and nonsuccess appears to depend on whether compensatory education funds have been channeled into traditional patterns of expenditure—salary increases, routine techniques, etc.—or whether they have been used to develop supplementary, focused, compensatory education programs. *The reason there is so much evidence of failure is that resources have more often been used in the former rather than the latter manner."* (Emphasis added). *"Effectiveness"*, Id at 11.

The Report spoke about the situation in California in this way:

> "The most complete data are those available from the State of California. * * * Achievement data was (sic) collected for about 80% of all participants in compensatory reading programs and analyses were conducted using data covering about 50% of the participating children. Only that achievement data which met specified quality control criteria was (sic) included. Over the four years covered by the data, 54% to 67% of children receiving compensatory services showed a rate of reading achievement gain larger than the usual maximum for disadvantaged children. Analysis and results for mathematics were similar and even slightly better. *We judge this to be clear evidence of success.* (Emphasis added). *"Effectiveness"*, Id at 7.

Dr. Sullivan testified that integration in Berkeley eased such problems as teacher turnover and low teacher experience; and Dr. O'Reilly questioned the value of compensatory programs in either an integrated or non-integrated setting. (A. 1929a-20a). It is small wonder that with this evidence, the District Court came to its conclusions.

But one of the most important observations in the *Coleman Report,* went, it seems, almost unnoticed. It is stated as follows:

> "This analysis has concentrated on the educational opportunities offered by the schools in terms of their student body composition, facilities, curriculums, and teachers. *This emphasis, while entirely appropriate as a response to the legislation calling for the survey,* [§ 402 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-1] *nevertheless neglects important factors in the variability between individual pupils within the same school; this variability is roughly four times as large as the variability between schools.* For example, *a pupil attitude factor,*

> *which appears to have a stronger relationship to achievement than do all the 'school' factors together, is the extent to which an individual feels that he has some control over his own destiny." "Coleman Report"* (1966) at page 22-23. (Emphasis added).

Dr. Sullivan spoke about the feelings of inferiority of the Negro student. He said, "it was very clear to me that in their isolation they [Negroes] were completely rejected and psychologically this came through." (A. 1579a).

Again, the *Coleman Report* disturbs a number of assumptions and eye-witness certainties, such as that:

> "When asked about whether they wanted to be good students, a higher proportion of Negroes than any other group—over half—reported that they wanted to be one of the best in the class (table 3.13.2)." *"Coleman Report"* (1966) at 278.

And in speaking about general attitudes toward themselves and their environment, held by students, the following is found:

> "Apart from the generally high levels for all groups, the most striking differences are the especially high level of motivation, interest, and aspirations reported by Negro students. * * * [And speaking about the child's concept of himself] In general, the responses to these questions do not indicate differences between Negroes and whites, but do indicate differences between them and the other minority groups." *"Coleman Report"* (1966) at pages 280 and 281.

But with the testimony before it, the District Court was moved from the comparative to the superlative sense of approach:

> "We have concluded after hearing the evidence that *only feasible and constitutionally acceptable* program—the only program which furnishes anything

> approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment." (Emphasis added). (App.Pet.Cert. 112a), 313 F. Supp. 90 at 96.

And the court continued with the same penultimate language in its findings: "Thus, the *only hope* for raising the level of these students * * * *"; "The *ideal approach*, and that which offers maximum promise * * * *" (Emphasis added), Id. at 96.

Such comments if spoken by an educator would be regarded as graduation-day puffing. But the court spoke as a matter of *constitutional law* and it subordinated compensatory education programs, educational experimentation and research, all, to a kind of warmed-over *Swann* remedy, as a solution to low average achievement in the court-designated schools.

The essence of what the petitioners ask in this part of the case is that this Court do the same thing.

II

This Court And The Congress Of The United States Have Not Interpreted The Fourteenth Amendment To Require A Specific Educational Performance Among Children Attending Public Schools. There Is No Data To Support Such An Interpretation; It Should Not Be Given Under The Name Of Racial Or Economic Desegregation.

A. Introduction

The Fourteenth Amendment was certified as a part of the Constitution on July 28, 1868, and its Equal Protection Clause forbids a state to "deny to any person within its jurisdiction the equal protection of the laws."

Thus, the Equal Protection Clause requires a state to treat in like manner all persons similarly situated. *State*

Board of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527 (1931); *Maxwell v. Bugbee*, 250 U.S. 525 (1919). It is a clause which does not, in law or fact, require identity of treatment. *Walters v. St. Louis*, 347 U.S. 231 (1954). And it permits a state to make distinctions between persons subject to its jurisdiction if the distinctions are based on some reasonable classification, and all persons embraced within the classification are treated alike. It outlaws invidious discrimination. *Avery v. Midland County*, 390 U.S. 474 (1968).

From 1868 to 1954, the Equal Protection Clause was interpreted to permit a state to impose, as a matter of state law, racial segregation in its public schools, when it furnished equal facilities for the education of the children of each race or races. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

"Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings." *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 11 (1971). "This case [*Swann*] and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what Brown v. Board of Education was all about." *Swann v. Charlotte-Mecklenberg Board of Education*, supra at 5.

In short, this Court struck down a governmental policy of racial segregation, which was effected in the public school system. The Court did not then, and not since that time has it used the Fourteenth Amendment to develop edu-

cational policy. *Brown* was not a case on educational programs and policies, and racial segregation was not a part thereof either.

Brown, and its progeny, was a case which struck at a government developed racial-social policy of segregation and discrimination in the public schools; such governmental policies meant inherent inequality by governmental order, which was developed and effectuated, in part, by use of the public school system. Thus this Court said, "The target of the cases from *Brown I* go the present was the dual school system." *Id.* at 22.

But the use of the public school system to develop and promote a governmental policy of racial segregation was only a part of the systematic program. It occurred and was struck down in public parks, *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954), in and on public beaches and bathhouses, *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955), municipal golf courses, *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), and on municipal buses, *Gayle v. Browder*, 352 U.S. 903 (1956), all on the authority and the concept of the *Brown* decision.

Under these authorities, the cases which hold that for a *Brown* violation there must be a state act in creating racial segregation or separation, rather than adventitious development, are simply legion. Among them are: *Springfield School Committee v. Barksdale*, 348 F.2d 261, 264, (1st Cir. 1965); *Offerman v. Nitkowski*, 378 F.2d 22 (2nd Cir. 1967); *Sealy v. Dept. of Public Instruction*, 252 F.2d 898 (3rd Cir. 1957), certiorari denied, 356 U.S. 975 (1958); *Deal v. Board of Education*, 369 F.2d 55 (6th Cir. 1965); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), certiorari denied, 377 U.S. 924; *Downs v. Board of Education*, 366 F.2d 988 (10th Cir. 1964), certiorari denied, 380 U.S. 914.

B. The Congress Of The United States Has Interpreted The Equal Protection Clause As A Constitutional Right To Be Free From Racial Discrimination In Public Schools

Section 5 of the Fourteenth Amendment provides:

> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Acting under the Fourteenth Amendment, and in response to this Court's decision in *Brown I*, and subsequent decisions, the Congress enacted subchapter IV, of the Civil Rights Act of 1964. In it, it gave an interpretation to desegregation (and thus segregation) 42 U.S.C. 2000c; it defined the power of the Attorney General to initiate a law suit to seek the desegregation of a school system, when a person is unable to initiate such an action, 42 U.S.C. 2000c-6; and it spoke specifically to the classification legitimacy, on bases other than race, color, religion or national origin, 42 U.S.C. 2000c-9. These interpretations were binding on the Denver School Board, and they were followed by the School Board. There was no finding of racial discrimination in the court-designated schools.

Congress is authorized to enforce the prohibitions by appropriate legislation under § 5 of the Fourteenth Amendment, *Ex Parte Virginia*, 100 U.S. 339, 345 (1879), and it could do so without regard to whether this Court or any court would hold the act prohibited to be in violation of the Equal Protection Clause. In seeking to promote the objects of the Equal Protection Clause the Congress prohibited racial discrimination in the public schools, it defined desegregation, and it specifically allowed classification of students on bases other than race, color, religion or national origin.

It was said:

> "In implementing the decision of the Supreme Court, we urge the Congress to be guided by two fundamental premises: (1) The American system of public education—an essential bulwark of a democratic system of government—should be preserved unimpaired; (2) the *constitutional right* to be free from *racial* discrimination in public education must be realized (Emphasis added). 2 *U.S. Code Cong. & Adm. News* p. 2504 (1964).

Section 410, 42 U.S.C. 2000c-9 provides:

> "Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

In speaking about this provision Senator Humphrey said:

> "Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide." 110 Cong. Rec. 12714 (June 4, 1964).

Again, Senator Humphrey said:

> "* * * The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school system. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is racial imbalance per se is not unconstitutional. * * *" 110 Cong. Rec. 12717 (June 4, 1964).

The interpretation given to the Equal Protection Clause by the Congress in subchapter IV of the Civil Rights Act of 1964 is binding here. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

C. Griffin-Douglas; Equitable Remedies; And Challenged Propositions Of Education.

The petitioners support the trial court's assertion that nondiscrimination, if it results in unequal treatment of the poor or a minority group, is unconstitutional unless the state shows a substantial interest therein, citing *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963); compare *Hunter v. Erickson*, 393 U.S. 385 (1969). *Contra, James v. Valtierra*, 402 U.S. 137 (1971).

From this position, the petitioners as well as the district court would sweep on to the full use of a court's equitable power under *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944), and *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15, (1971).[18] The result, as in this case,

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[18] But other courts, and authorities, have recognized that there is much more in the use of equitable judicial power than simply the recognition of its existence, which the petitioners show in their Brief on the Merits.

For example, the precise point was made by Chief Justice Burger, then Circuit Judge, in dissenting in the case of *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), at page 196, where he said:

> "Several commentators have expressed views which undergird what Judge DANAHER has said as to the need for caution and restraint by judges when they are asked to enter areas so far beyond judicial competence as the subject of how to run a public school system. We have little difficulty taking judicial notice of the reality that most if not all of the problems dealt with in the District Court findings and opinion are, and have long been, much debated among school administrators and educators. *There is little agreement on these matters, and events often lead experts to conclude that views once held have lost their validity.*" (Emphasis added).

And the dissent cited impressive authority where the point is further discussed. Among them are: Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U.Chi.L.Rev. 583, 592, 594, 595 (1968); Hobson v. Hansen, *The DeFacto Limits on Judicial Power*, 20 Stan.L.Rev. 1249, 1267 (1968); Hobson v. Hansen: *Judicial Supervision of the Color-Blind School Board*, 81 Harv.L.Rev. 1511, 1527, 1525 (1968).

The point that policy commitments are present in asserting equitable power and decrees was made by Professor Alexander Bickel: "Willy-nilly, the Supreme Court imposes a choice of educational policy, for the time being at least * * * and I don't think we can be sure that the

is to subordinate, if not bury, innovative compensatory educational programs, unless they march in lockstep to the *Brown I—Swann remedies.*

The substantial interest of the State of Indiana is in preventing the constitutionalization of education propositions, which, in the context of constitutional law, may be called "myths".

A short time ago, Mr. Justice Harlan reminded us that "*[d]ecisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations.*" *Katzenbach v. Morgan,* 384 U.S. 641, 668 (1966) (Emphasis added).

With that thought in mind, the amicus presents to the Court several "Propositions of Education" which are implicit in this case, and in the District Court's action:

"Proposition of Education, No. 1":

> The amount of money spent determines the goods and services bought, which in turn determines the effectiveness of the school in developing and meeting the needs of a child.

This proposition appeared in rough form when it was asserted by Charles Sumner in 1849 before the Massachusetts Supreme Court. He argued that racially segregated schools in Boston, Massachusetts, provided unequal opportunities for Negroes and whites. The ground for the argument was that his "client, a Negro girl, had to walk 2100 feet to her school while a white school was only 800 feet away from her home. He lost the case, but the same

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choice is the right one * * * Professor Bickel cannot be read to oppose school integration; but rather, he opposes *Swann* because it *willy-nilly decided that the nation's legal order compels the racial mixing of students [where there was a dual school system] as a matter of educational policy.*" Comment, *Civil Rights v. Individual Liberty,* 5 Indiana Legal Forum 368, 376 (1972).

kind of reasoning has pervaded the thinking of educators, the courts, and the public ever since. Up to 1954, innumerable attempts were made to prove that the separate education of Negroes in the South was either equal or not equal to white education by comparing schools in respect to their location ["inferior status of these school (is) the enforced isolation imposed * * * (by) neighborhood schools and housing patterns, 313 F.Supp 61 at 83 (1970)], the quality of their buildings ["the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school," 313 F.Supp. 61 at 81], the adequacy of facilities, the number of courses in the curriculum, the length of the school term, the paper credentials of teachers, and most importantly, the amount of capital outlay and annual expenditure per pupil." Mosteller & Moynihan, *"On Equality of Educational Opportunity,"* Dyer, page 514, (Vintage Ed. 1972).

Since 1954, and *Brown I*, the Court has disposed of the proposition, it too an educational myth, that to separate a child by government policy from an available school because of his race is somehow to treat him equally under the law.

The Court is being pressed to create another myth in its place, and in turn, to reinterpret *Brown I*. It is, essentially, that a minority child cannot be educated and receive equal educational opportunity unless his separation, from a majority group regardless of cause, is judicially destroyed.

"Proposition of Education, No. 2":

> The measure of equal educational opportunity is found in counting the dollars and cents spent on one school, or in one school district and comparing that with another school district, or school.

Probably the most extreme form of this assertion is found in the California case of *Serrano v. Priest*, 96 Cal. 601, 487 P.2d 1241 (1971). However, Mr. Dyer says this:

> "There is no guarantee that a more expensive installation is inherently better, if only as a piece of machinery, than a less expensive one. There is also no guarantee that a more expensive laboratory is capable of producing more language learning than a less expensive one, or indeed no language laboratory at all . * * * (During the period of excitement over the possibilities for audio-lingual instruction, many schools bought language labs that are now gathering dust.)" "Mosteller & Moynihan, *"On Equality of Educatonal Opportunity,"* Dyer, page 514-515. (Vintage Ed. 1972).

"Proposition of Education, No. 3:"

> Achievement Test Scores Determine the Education Received; the Equality Thereof; and Whether There is an Equal Educational Opportunity.

But a major educational reading does gainsay the statement:

> "The tendency is to assume that if on a reading test the 6th-grade pupils in a slum school average X points lower than those in a school in white suburbia, then X is the measure of the difference between the two schools in the effectiveness of reading instruction. The case may be quite the opposite: the slum school may be *more* effective than the suburban school in upgrading reading competence, especially in light of the deficiencies it has had to overcome." "Mosteller & Moynihan, *"On Equality of Educational Opportunity,"* Dyer, page 515. (Vintage Ed. 1972).

D. On Experimentation In Education And The Fourteenth Amendment

Certainly the State of Indiana does not say that there is no relationship between money spent, excellence of teachers, quality of facilities, teacher credentials, and the myriad concepts relating to educational standards and educational goals, and the product of the school system: the student. Obviously, there is; but equally obvious, or it should be, is the fact that it is not yet determined to an extent that a rule of *Constitutional Law* can be declared based upon it. But if this Court were to approve the fashioning of an equity decree, based upon, essentially, achievement criteria and a disparity among them, then there would be a major obstruction by the Judiciary in the environment and development of education programs, throughout Indiana and the United States.[16]

> "One of the compelling reasons for educational experiments is the importance for society of every improvement in the learning process." Mosteller & Moynihan, *"On Equality of Educational Opportunity,"* ~~Dyer~~, page 377. (Vintage Ed. 1972).

But success is still not a certain thing. For example:

> Indeed, after half a century of tightly controlled studies of optimum class size, we have made practically no progress toward answering the question (perhaps nature is hinting that the question is a poor one as customarily phrased). It is not that we haven't done controlled investigations, but rather that the studies have been too small and specialized for their implications to have much chance of holding in new situations." Mosteller & Moynihan, *"On*

[16] Mr. Justice Powell, concurring, spoke exactly to the point in saying: "In an age in which empirical study is increasingly relied upon as a foundation for decision making, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives." *Johnson v. Louisiana*, — U.S. —, 92 S.Ct. 1635, 1641 (1972)

Equality of Educational Opportunity," ~~Dyer~~, page 375. (Vintage Ed. 1972).

"The controversies about the Coleman Report show that we still are ignorant of what makes education tick for children and of why what works for some doesn't seem to for others. For whom is laissez faire wise, and for whom a lockstep program? Naturally we do not expect that only one sort of program is workable, because children can adapt to or resist most things. *Our point is that when a big national effort is as little understood as education now is, we are obligated to experiment."* (Emphasis added). Mosteller & Moynihan, *"On Equality of Educational Opportunity"*, page 378 (Vintage Ed. 1972).

To say that equity, as a judicial matter, should recognize as a judicial wrong the achievement level distinctions among students in public schools, and then proceed to order that the levels be equalized, pursuant to a decree which a District Court might attempt to fashion, is judicial obstructionism in its worst form; indeed, the Court might as well order an Opera Soprano to sing well.

To try to succeed is the essence of the thing, and that, precisely, is what the Denver School District was, and is, attempting to do.

The conclusion is manifest: the Fourteenth Amendment should not be construed to effect the adoption, as a matter of Constitutional law, of one specific educational policy, and programmatical result: equal achievement levels.

CONCLUSION

Mr. Justice Holmes once observed that,

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic

> theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.*" *Lochner v. New York,* 198 U.S. 45, 75-76 (1905).

If this be so, then must the Fourteenth Amendment embody the social-educational theory of a Dr. Neal Sullivan, among several others?

In reversing the District Court in Richmond, Virginia, the United States Court of Appeals for the Fourth Circuit said, in speaking about the expert testimony in that case, that,

> "We think it fair to say that the only 'educational' reason offered by the numerous school experts in support of consolidation was the egalitarian concept that it is good for children of diverse economic, racial and social background to associate together more than would be possible within the Richmond school district. *Bradley v. School Board of Richmond, Virginia,* (June 5, 1972, slip opinion at page 25).

One can look at this case in Denver, and the record which was produced, and see that a similar tide was running. It was, as is,[17] that a particular theory, a particular way of approach, a specific "educational" program, a specific theory of "education", namely social reform and massive

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[17] In the Richmond case, the principal expert testimony for the plaintiffs came from Dr. Thomas F. Pettigrew, whose central theme was that all good things shall come from a carefully calibrated racial mixture which would give white superiority by, ideally, about a 70-30 ratio. Here the expert testimony was only less candid.

"The invidious nature of the Pettigrew thesis, advanced by the dissent in the present case, thus emerges. Its central proposition is that the value of a school depends on the characteristics of a majority of its students and superiority is related to whiteness, inferiority to blackness. Although the theory is couched in terms of 'socio-economic class' and the necessity for the creation of a 'middle-class milieu,' nevertheless, at bottom it rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils." *Brunson v. Board of Trustees,* 429 F.2d 820, 826 (4th Cir. 1970) (Judge Sobeloff, concurring).

societal remolding, should receive not only approval, but the dignity and the compulsion of constitutional law.

In the core area of Denver, there was no racial discrimination; there was no dual school system; there has never been. But the District Court wanted a result. That result was the mixing of persons in the schools, so that the public schools in Denver could act, according to the District Court, as a substitute for the home and the church. To accomplish that result, the District Court attached itself to equal achievement levels and from this it evolved a principle and holding of constitutional law.

It is clear that the curse at which Holmes directed his pen remains. It is the curse of binding constitutional rigidity based upon the cry of the moment, and the passion of the hour: equal achievement levels in the public schools. The terrible flaw in the District Court's desire is that it read the Constitution to embrace exclusively the passion of the moment. But the record in this case does not support the District Court; and massive other data do not support the District Court. Further, this Court should resist fully the temptation to enter into the thicket of educational policy and educational philosophy.

Accordingly, the State of Indiana urges that this Court affirm the decision of the United States Court of Appeals in this case, to the extent that it reversed the District Court.

Respectfully submitted,

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